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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re the Marriage of COLLEEN and ROBERT
SHORT.

COLLEEN M. SHORT,

Respondent,

v.

ROBERT L. SHORT,

Appellant.

F065344

(Super. Ct. No. 437086)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Stanislaus County. Jack M. Jacobson, Judge.

Robert Short, in pro. per. for Appellant.

No appearance for Respondent.

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Appellant Robert L. Short (Husband) contends the trial court erroneously denied his motion to set aside a default judgment entered against him in a marriage dissolution proceeding. Despite Husband's incarceration from before the default through the filing

* Before Cornell, Acting P.J., Kane, J. and Franson, J.

of his motion to set aside the default judgment, the trial court concluded the motion was untimely. Specifically, the court found that the motion to set aside the default judgment was not filed within the six-month period prescribed by Code of Civil Procedure section 473, subdivision (b).

The appellate record clearly establishes that Husband's motion was deposited in the prison's mail more than six months after the judgment was entered. Furthermore, Husband has not demonstrated that the six-month limit is unconstitutional on its face or unconstitutional as applied to his situation. Thus, the trial court correctly denied the motion on the ground it was untimely.

We therefore affirm the order denying the motion to set aside the judgment.

FACTS AND PROCEEDINGS

On June 7, 2010, Husband filed a petition for dissolution of marriage with the Fresno County Superior Court.

Ten days later, Colleen Short (Wife) filed a petition for dissolution of marriage with the Stanislaus County Superior Court.

Later in June 2010, Wife filed a motion to quash the dissolution proceedings Husband had filed in Fresno County Superior Court or, alternatively, to transfer venue to Stanislaus County. The Fresno County Superior Court heard Wife's motion and issued an order denying the motion to quash, but granting the motion to transfer the case to Stanislaus County.

In August 2010, Husband's attorney ceased representing him and thereafter Husband represented himself in the dissolution proceeding and in this court.

On December 3, 2010, a case management conference was held by the Stanislaus County Superior Court. At that time, Husband had not filed a response to Wife's petition for dissolution and no default had been entered. The court set a further case management conference for March 4, 2011.

On December 9, 2010, Husband was arrested and held in the Fresno County Jail. Subsequently, he was sentenced to a six-year term and was transferred to the custody of the California Department of Corrections and Rehabilitation (CDCR). Currently, Husband is being held by the CDCR at the California Medical Facility in Vacaville. Husband asserts that the earliest permissible date of his release is December 13, 2013.

On March 4, 2011, the scheduled case management conference was held and the Stanislaus County Superior Court signed a minute order stating that Husband had filed a response to the petition for dissolution, but had not served a preliminary declaration of disclosure. The court noted that Husband was incarcerated, directed Husband to file a declaration within 30 days, and set a further case management conference for May 6, 2011. A proof of service indicated the minute order from the case management conference was served on Husband at the Fresno County Jail on March 8, 2011.

In late March and early April, Wife's attorney sent letters to Husband reminding him of the court order to file a preliminary declaration of disclosure and advising him that if he failed to comply, she would file a motion to strike his response and proceed by way of a default.

In May 2011, Wife filed a motion to strike Husband's response and enter a default. Wife's motion was based on Husband's failure to comply with the court order to file and serve a preliminary declaration of disclosure.

The hearing on Wife's motion to strike and enter a default was set for June 15, 2011. The appellate record indicates that after Wife filed her motion Husband filed a motion for a continuance and a declaration in support of his motion for a continuance. Neither Husband's motion for a continuance nor the declaration in support of that motion is included in the clerk's transcript. The clerk's transcript does contain Wife's opposition to Husband's motion for a continuance and her declaration in support of her opposition.

The minute order from the June 15, 2011, hearing (1) indicated that neither Husband nor Wife was present, (2) denied Husband's request for a continuance, and (3) granted Wife's motion to strike his response and enter a default.

On July 14, 2011, a judgment of dissolution and a notice of entry of a judgment of dissolution were filed. The judgment denied spousal support to both parties, divided community property and debts, and confirmed certain items as the separate property of Husband or Wife. The clerk of court mailed a copy of the notice to Husband at a post office box for CDCR in Vacaville.

Over eight months later, on April 3, 2012, Husband filed a motion to set aside the judgment. His declaration supporting the motion stated that (1) he was an indigent prisoner incarcerated by the California Department of Corrections and Rehabilitation at the California Medical Facility in Vacaville, (2) the default judgment was taken against him while he was incarcerated and unable to obtain an attorney or personally appear in court to defend his interests, and (3) he believed the default judgment had deprived him of this constitutional rights of due process and equal protection to access the courts. The declaration did not address why more than six months passed between the mailing of the notice of entry of judgment and the filing of Husband's motion to set aside the default or why he did not file and serve the preliminary declaration of disclosure ordered by the court.

On May 14, 2012, the trial court held a hearing on Husband's motion to set aside the default as well as Wife's request for an order requiring Husband to remove his personal property from her residence. The court confirmed its tentative ruling and denied the motion to set aside the default judgment as untimely. The court concluded that the April 2012 motion had not been filed within six months of the entry of the July 2011 judgment.

In June 2012, Husband filed a notice of appeal that stated he was appealing the court's ruling that denied his motion to set aside the judgment.

In January 2013, Husband filed his opening brief with this court. In February 2013, this court sent a letter to Wife notifying her that if she did not file a respondent's brief or make a showing of good cause for relief within 15 days, the appeal would be submitted for decision upon the record and Husband's opening brief. Wife did not file a respondent's brief.

DISCUSSION

I. STATUTE'S SIX-MONTH PERIOD FOR RELIEF FROM DEFAULT

Code of Civil Procedure section 473, subdivision (b) provides that the "court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." The statute further provides that an application for relief "shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken."¹ (Code of Civ. Proc., § 473, subd. (b).)

"The six-month time limit for granting relief under section 473 is jurisdictional and relief cannot be granted under section 473 if the application for such relief is instituted more than six months after the entry of the judgment, order or proceeding from which relief is sought." (*Aldrich v. San Fernando Valley Lumber Co.* (1985) 170 Cal.App.3d 725, 735, fn. 3.) The California Supreme Court has considered the statutory time limit and stated that where more than six months have elapsed from the entry of default, relief under section 473 is unavailable. (*Rappleyea v. Campbell* (1994) 8 Cal.4th

¹ As a result of this requirement for action within a reasonable time, a moving party has the burden of showing that he or she acted diligently once learning of the judgment. (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1420.) Whether a party acted diligently is a question of fact for the trial court. (*Ibid.*) In the instant case, the trial court did not address whether Husband acted with reasonable diligence because it determined Husband failed to meet the six-month deadline.

975, 980, citing to *Aldrich v. San Fernando Valley Lumber Co.*, *supra*, at p. 735, fn. 3; see 8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 175, p. 773 [“a court has no authority under C.C.P 473(b) to excuse a party’s noncompliance with the 6-month limit”].)

To calculate whether the application for relief was made within the six-month period, a court must identify (1) the date on which the period begins to run and (2) the date on which the application for relief was “made.” If the second date is more than six months after the first date, the inquiry ends and the motion for relief under Code of Civil Procedure section 473, subdivision (b) must be denied.

California courts have held that the six-month period runs from entry of default, not entry of judgment. (*Manson, Iver & York v. Black* (2009) 176 Cal.App.4th 36, 42.) In the instant case, the clerk’s transcript contains the June 15, 2011, minute order granting Wife’s motion to enter default after striking Husband’s response. The clerk’s transcript also contains the judgment of dissolution and the notice of entry of judgment, both of which were filed on July 14, 2011. !(CT 43, 60, 66)!

An “application for relief under the statute is deemed to be made *upon filing in court of a notice of motion and service of the notice of motion on the adverse party.*” (*Arambula v. Union Carbide Corp.* (2005) 128 Cal.App.4th 333, 341, original italics.) In the instant case, the Husband’s motion to set aside the judgment was filed on April 3, 2012. The proof of service for that motion states that the motion was deposited in a mail box at the prison in accordance with prison rules on March 25, 2012.

We will assume that the prison-delivery rule² applies to Husband’s motion to set aside the judgment and, thus, will use March 25, 2012, as the date on which Husband

² In *Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, the California Supreme Court held that the prison-delivery rule applied to a self-represented prisoner’s filing of a notice of appeal in a civil case. Under that rule, a document is deemed constructively filed when it is delivered to prison authorities pursuant to the procedures

“made” his application for relief. This date is more than nine months after the issuance of the order granting Wife’s motion to enter default and is more than eight months after the entry of the judgment. Therefore, regardless of which of these events triggered the six-month period, Husband’s motion was untimely and the trial court lacked jurisdiction to grant relief under Code of Civil Procedure section 473, subdivision (b). Therefore, we must affirm the trial court’s order denying Husband’s motion for relief.

II. CONSTITUTIONAL CLAIMS

As to Husband’s constitutional arguments, they are directed at the failure to allow him to attend in person or by telephone the hearing at which Wife’s motion for entry of default was granted. Husband’s constitutional arguments are not a facial challenge to the statute’s six-month limit and are not an as-applied challenge to the enforcement of the six-month period in the circumstances presented by this case. Therefore, the arguments do not establish that the denial of Husband’s motion as untimely violated his constitutional rights to due process or equal protection.

DISPOSITION

The May 14, 2012, order denying Robert Short’s motion to set aside the default judgment is affirmed.

Because respondent has not appeared in this appeal, we direct that each party shall bear his or her own costs on appeal.

established for prisoner mail. (See *In re Jordan* (1992) 4 Cal.4th 116 [notice of appeal in criminal case is deemed timely filed if delivered to prison officials within 60-day filing period].)